

LEGISLATIVE RESEARCH COMMISSION

COASTAL SUBMERGED LANDS



REPORT TO THE
1985 GENERAL ASSEMBLY
OF NORTH CAROLINA

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LEGISLATIVE RESEARCH COMMISSION

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December 13, 1984

TO THE MEMBERS OF THE 1985 GENERAL ASSEMBLY:

The Legislative Research Commission herewith reports to the 1985 General Assembly on the matter of Coastal Area Submerged Lands. The report is made pursuant to Chapter 112 (section 3) of the 1983 Session Laws.

This report was prepared by the Legislative Research Commission's Committee on Coastal Area Submerged Lands and is transmitted by the Legislative Research Commission for your consideration.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Liston B. Ramsey".

Liston B. Ramsey

A handwritten signature in cursive script that reads "W. Craig Lawing".

W. Craig Lawing

Cochairmen

Legislative Research Commission

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INTRODUCTION

The Legislative Research Commission (LRC), created by Article 6B of General Statutes Chapter 120, is authorized at the direction of the General Assembly "to make or cause to be made such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)) and "to report to the General Assembly the results of the studies made," which reports "may be accompanied by the recommendations of the Commission and bills suggested to effectuate the recommendations." (G.S. 120-30.17(2)). The Commission is chaired by the Speaker of the House and the President Pro Tempore of the Senate, and consists of five Representatives and five Senators, who are appointed respectively by the Cochairmen. G.S. 120-130.10(a). The membership of the Commission is listed in Appendix A.

The 1983 General Assembly, in Chapter 1112 (H.B. 738, Sec. 3) of the 1983 Session Laws, authorized the Legislative Research Commission to study numerous issues relating to submerged lands and coastal waters. The relevant provisions of the law are at Appendix B.

Pursuant to G.S. 120-30.10(b) and (c), the Commission Cochairmen appointed a Study Committee consisting of ten (10) members; three Senators, five Representatives, two nonlegislative members, and an LRC member to be in charge of the study.

Senator R.C.Soles and Representative Paul Pulley were designated as Cochairmen of the Committee. The Committee membership is at Appendix C.

This report presents a background and legislative history of the study, a summary of the Committee proceedings, the Committee findings, and its recommendations.

I. LEGISLATIVE BACKGROUND

This Committee's charge, according to the legislation authorizing the study, is to examine various issues which relate to the ownership of coastal submerged lands. The study was authorized after a bill that would appropriate additional funds to the Department of Justice was introduced during the 1983 Session of the General Assembly. The bill, SB 617, requested an appropriation of \$99,557 for fiscal year 1983-84 and \$120,547 for fiscal year 1984-85 to establish two attorney positions in the Environmental Section of the Department of Justice. The attorneys were to be employed exclusively in the resolution of claims filed pursuant to G.S. 113-205.

This statutory provision, first enacted in 1965, requires, among other things, that all persons "claiming any part of the bed lying under navigable waters . . . or any right of fishery in navigable waters" in any of 25 coastal counties, and which claims were "superior to that of the general public" were to register such claims with the Secretary of Natural Resources and Community Development. The registrations were to be completed by January 1, 1970, or the claims would be rendered "null and void." According to the Attorney General's Office

approximately 10,000 claims have been filed within the statutory deadline.

Senate Bill 617 was not enacted. Instead the General Assembly, in Section 3 of Chapter 1112 (H.B. 738) of the 1983 Session Laws, authorized the Legislative Research Commission to study several matters relating to submerged lands and coastal waters; and to report to the 1985 General Assembly. The matters to be studied are:

- (i) The ownership of submerged lands and coastal waters in 25 counties designated in G.S. 113-205;
- (ii) Court decisions dealing with the issue of ownership of the lands and waters;
- (iii) The nature of the claims and the impact recognition of the claims would have on existing public uses of the lands and waters;
- (iv) Whether or not additional laws are needed to address and resolve the claims;
- (v) The existing statutory provisions governing the State's management of submerged lands;
- (vi) Whether or not additional laws are needed to revise the existing management system for submerged lands held by the State; and
- (vii) Other matters relating to the private claims and the management of submerged lands held by the State.

II. COMMITTEE PROCEEDINGS

The Committee met on Friday, November 16, 1984. At the meeting the Committee was given a fairly comprehensive presentation of the problems and the various issues affecting submerged lands. The Attorney General's Office, represented by Mr. Daniel McLawhorn, gave the Committee a comprehensive account of the Attorney General's activities on the submerged land claims to date, the legal history of the topic, a survey of the claims filed under G.S. 113-205, an outline of a policy adopted by the Department of Administration and the Department of Natural Resources and Community Development for resolving submerged land claim, and an outline of the problems which the Attorney General's Office feels require immediate attention by the General Assembly.

A. Activity of the Attorney General's Office.

The Committee learned that about 3,000 claimants registered approximately 10,000 claims under G.S. 113-205. For purposes of resolving the various claims, the Attorney General's Office has divided them into five basic categories. They are: (1) shellfish claims, (2) marshland claims, (3) fee simple claims, (4) claims to lands that are not actually submerged, and (5) various miscellaneous claims. Mr. McLawhorn exhibited for the Committee's inspection various aerial photographs and other maps of the areas that have been privately claimed.

Mr. McLawhorn informed the Committee that there was very little activity on the claims between 1974 and 1981. In

1981 the Attorney General's Office brought the matter to the attention of the various State agencies which had some type of involvement with submerged lands, and the claims to them. The agencies included the Secretary of Administration and the State Property Office, the State Board of Education, which had issued a significant number of grants to submerged lands, and the Department of Natural Resources and Community Development and the various agencies within that department that are responsible for the management of coastal areas.

It was noted that the agencies tended to agree that the Secretaries of Administration and Natural Resources and Community Development should take the lead and go forward with the resolution of the claims to the submerged lands. The claims to the high grounds have been referred to the State Property Office.

In 1983 the Secretary of Administration and the Secretary of NRCD supported legislation for funds to the Attorney General's Office to employ two attorneys to begin the process of examining the claims, and to determine what the State should do to resolve them. Funds were also allocated for the production of the photographs that depicted the claims as mapped by NRCD. The Attorney General's Office began to put the claims into identifiable categories. They were divided into five basic categories, based upon their understanding of the law, and upon the nature of the claims filed. The claims of 1,545 individuals have already been reviewed. They are concentrated in the counties of Onslow, Hyde, Pender, New

Hanover, and approximately three-fourths of Brunswick County. Priority was given to these counties because they are the areas of the most extensive claims.

It was noted that approximately seventy percent (70%) of the waters and marshlands from Morehead City to South Carolina have been privately claimed.

A question concerning the Board of Education's role in granting and conveying submerged lands to private individuals was raised. It was noted that the Board of Education once claimed the estuarine marshland complex from Surf City to the Cape Fear River. The Board parcelled out the areas by deed, and sold both the beds of the sound, the bed of the streams, the marshlands, and the flooded marshlands in the 1920's and 1930's. This was done after consulting with the Attorney General's Office. The office during that period had issued an opinion advising, that under an amendment to the Statutes in 1891 the Board of Education did own the marshlands and estuarine marshlands. The opinion did not discuss open water areas.

Mr. McLawhorn noted that there have been four cases litigated which involved the deeds issued by the Board of Education. The cases have involved issues where developers had pumped, dredged and filled the bed of the sound and created lands on the back side of Carolina Beach and Wrightsville Beach. The issue of title was raised, i.e. whether lands belonged to the private individual or the State.

The Committee inquired about the burden that is being placed on an individual who files a claim pursuant to G.S. 113-205. It was asked whether or not such individuals were required to submit a chain of title to substantiate their claims. Mr. McLawhorn responded that when the Attorney General's Office goes through the resolution process, it requests a chain of title from the claimant. However, the Attorney General also works independently to see whether or not a chain actually exists. It was noted that the Attorney General's Office has retained private counsel in New Hanover County to assist it in determining who the present owners are of tracts of submerged land in New Hanover County. A similar approach is planned for Brunswick County, and the Attorney General's Office plans to do its own research in Onslow, Hyde and Pender Counties. It was further noted that the Attorney General takes the position that to the extent that the Board of Education deeds embrace an area of open waters they are invalid, but they are valid from the areas of marshlands that the deeds purport to transfer.

B. Legal History.

The Committee was given a comprehensive summary of the legal history of submerged lands. It was noted that the North Carolina law is complex; and that a good deal of judicial history, particularly in the nineteenth century, have been created on the subject. Mr. McLawhorn submitted a copy of an unpublished law review article entitled, "OWNERSHIP OF THE ESTUARINE LANDS IN NORTH CAROLINA: Has the Public Trust Been

Sold?" The article generally traces the development of the law, and outlines the current status of the law in terms of the 'public trust' doctrine.

North Carolina has been one of the leading states in the protection of submerged lands. Both the statutes and case law show that the State goes to great lengths to prevent them from being lost. The legal history was explained in terms of the public trust doctrine.

The public trust doctrine basically says that the State holds title to the submerged lands under navigable waters. But it is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of this State so that they may navigate, fish, and carry on commerce in the waters involved. The State has been without authority to sell any of the State lands that are under navigable waters since the early eighteenth century. In fact there were laws enacted in 1711 and 1719 both prohibiting the granting of exclusive rights to navigable waters, and the beds underneath those waters. The rivers, creeks, and sounds were the highway system of the State since the State had no highway system then. North Carolina has generally prohibited the granting of navigable beds and streams of water in fee simple in a way that would restrict the use of the waters for commerce, for fishing and for other pleasure activities.

The Attorney General's presentation of the legal history concluded with the case of State v. Forehand, 67 N.C. App. 148 (1984), which outlines the law on public trust right in North

Carolina. A copy of the case is attached, and it is a part of this report. It is included as Appendix . The case generally says that a deed based on a 1909 State grant was void on its face to convey a fee title in land; because the grant purported to convey thirty-three acres of submerged lands covered by the waters of the Roanoke and Albemarle Sounds. The Court further pointed out that ever since statehood North Carolina's policy has to prohibit the sale in fee simple of State lands under navigable waters. The title, the court ruled, was merely an exclusive easement to erect wharves on the submerged lands, but it did not convey a fee title. Therefore, the deed holder had no standing to contest the trial court's decision denying him a share of the condemnation proceeds.

The Committee discussed the complexities of the issues relating to navigable waters. The law appears to be that "navigable waters" are waters that "are navigable in fact." Navigability appears to be a paramount concern when private ownership submerged lands is claimed. It is acknowledged that there are private and valid claims to submerged lands. However, there can be no fee simple claims that are not embraced with a public trust right of navigation, fishing, or recreational use. All of the claims to submerged land have public trust rights which continue in the public even if a valid conveyance of a bed was given.

It was noted that most people are not familiar with the concept of public trust. The public apparently takes for granted that there is a right to fish, to swim, and to engage

in other forms of activities at will. This has generally been the accepted rule. As a result of the claims filed under G.S. 113-205, those uses may be seriously undermined.

In response to the Committee's inquiry about filled land, it was noted that, by statute, lands that are filled and raised by any means become vacant and unappropriated lands. By adverse possession, that is, twenty one (21) years with "color of title" or thirty (30) years without title, one can acquire title to such land even though they were created lands.

C. Survey of Claims.

The Attorney General conducted a random survey of the claims filed under G.S. 113-205. This survey applied five categories which the Attorney General's Office currently uses to address G.S. 113-205 claims. It was found that: (i) twenty-three percent (23%) of the claims involved shellfish rights; (ii) seventeen percent (17%) involved marshlands; (iii) twenty-six percent (26%) involved fee sample interests, which includes wharf rights; (iv) approximately thirty-two percent (32%) were not submerged or were so poorly described they could not be located; and (v) approximately two and one-half (2.5%) were in a miscellaneous category involving utility easements, railroads and riparian rights. A copy of the survey of the claims is attached to this report at Appendix .

D. Submerged Lands Policy Adopted by DOA and NRCD.

The Secretary of Administration and the Secretary of Natural Resources and Community Development agreed on a

submerged lands policy in April of 1984. The text of that policy is attached and is a part of this report.

The non-binding policy serves as a guide to the individuals with responsibility for disposition of the claims. It was noted that there was five-person task force that looked at the law and recommended the appropriate ways to respond to the claim. In the first two policy statements, the task force took the position that there can be no fee ownership of navigable waters, either of the sounds or of the major creeks and streams of the eastern part of the State. On this point, the Attorney General's Office is of the view that the claims of fee simple ownership to the river bottoms are invalid. There is not an exclusive ownership of the beds and the waters above it. Where fee simple ownership is asserted on the basis of an original conveyance, the Attorney General will respond that there is no interest. That is to say, the original State land grant was invalid. Alternatively, the A.G. would argue that the grant was limited to a wharf easement; and therefore, only limited rights were conveyed.

The policy notes that some private interests are recognized, they are for a specific type of interest, e.g the right to harvest oysters, or clams. However, in the exercise of those private rights the owner cannot interfere with navigation, and may not forbid other public uses of the waters.

With regard to the tidal marshlands addressed in the policy statement, Mr. McLawhorn said that the sale of marshlands was originally for the purpose of funding the public

education system. The Attorney General now believes that all of the Board of Education deeds conveying marshlands were valid, however, remedial legislation is desired in this area. The legislation should provide that for the flooded marshlands, any public trust rights that applied before they were outconveyed continued in place. The other items in the policy statement of the Secretaries of Administration and NRCD addressed the interests that are to be recognized in Board of Education deeds. The policy statement is included at Appendix .

E. Legal Concerns Highlighted.

Several areas of concern were emphasized to the Committee. These are matters which the Attorney General's Office felt that the Legislature should address immediately.

1. Ownership of Artificially Filled Lands

It was noted that some states have required individuals to pay for artificially created filled lands. It was proposed that North Carolina not follow this approach, but wherever possible claims should be recognized without any undue burden on the claimant. The State is interested in the Spoil Islands which are critical areas which should be kept in State's ownership for conservation. Legally, title to raised lands could be perfected by adverse possession, because once they are raised they become vacant unappropriated lands, and under G.S. 1-35 are subject to adverse possession by private citizens who

occupy them for twenty-one years under "color of title," or through the Board of Education deeds or other State issued instruments. On the other hand, they could occupy such lands without color of title for thirty years and still gain title by adverse possession.

2. Acquiring Ownership of Public Trust Property by Adverse Possession.

There is concern that the registering of the claims with the Secretary of NRCD puts the State on notice of private claims to the areas. In many instances there is some instrument upon which the claimant relies. Thus, the year 1990 is critical, because that would represent the 21 year period of adverse possession. The State needs to move forward to resolve these claims. While G.S. 113-206(a) provides that the registering of the claims "in no way implies recognition by the State of the validity of the claim," the adverse possession statute G.S. 1-35(2) may be argued to nevertheless, render the titles perfected.

3. Prescription of Piscary (exclusive right of fishing)

This concept has been raised in a pending law suit. The claimant is unable to show a chain of title to approximately 80 acres of submerged lands. He, however claims that because he and his family have

been harvesting oysters on the particular lands since 1919, and have excluded the public, a prescription of piscary was obtained acquired by adverse possession. Summary judgment is being sought to determine if this doctrine is valid in North Carolina. If it is allowed, the implications for the state could be serious. The philosophy underlying prescription of piscary is similar to that which permits a private individual to obtaining title by adverse possession.

4. Resolution Procedures Under G.S. 113-206(e) Involving the Industrial Commission should be modified.

Under G.S.113-206(e) if in the application of the provisions of G.S.113-205, or of G.S. 113-206 itself, there is deemed to be a taking of private property, a claimant may apply to the Industrial Commission for the award of whatever damages may be proven. That Commission, among other things, hears cases on workmen's compensation, and tort actions against the State. It is the position of the Attorney General's Office and the Committee that the better place to resolve submerged lands claims is in the Superior court of the county in which the land is located.

5. Establishing a Time Limit for the Disposition of Claims by 1990.

The position of the Secretary of Administration with respect to submerged lands claims was put to the Committee. A definite time table for the resolution of claims should be imposed upon the appropriate State official. The official should be required to notify the claimants of the State's position on what rights will be recognized, and on what will be refused. There should be an annual report to the Legislative Commission on Joint Governmental Operations. This will apprise the Legislature on what progress is been made on the claims, and assure that the 1990 deadline will be met.

6. Board of Education Deeds to Spoiled and Filled Lands

Mr. McLawhorn urged the Committee to recommend legislation to confirm certain Board of Education deeds which might have had irregularities.

7. Establishing a Guardian of the Public Trust

The Committee was urged to seriously examine the question of public trust rights, and to make a determination of who ought to enforce such rights. It was noted that there are nor statutory provisions for a guardian or an enforcer of public trust rights.

The Department of Administration has important responsibilities with respect to managing, controlling, and disposing of submerged lands. This, however does not include the waters above such lands, and the recreational rights to such waters. Moreover, while the Department of Natural Resources and Community Development (NRCD) has responsibility to control sedimentation and erosion in white water and mountain streams, no agency has responsibility to protect their use for the benefit of the public. It was asserted that the Attorney General's Office should have such responsibility. However, that office is not in a position to investigate or advocate those causes. Information is needed from the agencies with people in the field to see and report when the public trust rights are being violated. Drafting legislation to accomplish this objective, it was acknowledged, would be a complex undertaking. A policy direction should first be developed.

In light of the concerns raised about the public trust rights, the Committee inquired if the State gave authority to the Coastal Resources Commission (CRC) of public trust areas. It was noted that the CRC has some responsibility to look out for the public trust rights when it receives applications in the 20 coastal counties that are within the areas of

environmental concern, e.g. the sounds, rivers, and other bodies of water.

Some other concerns were brought to the Committee's attention. Mr. J.K. Sherron, Deputy Secretary of Administration, representing the State's Property Office, noted that there are significant property rights at stake. He questioned what the State's policy is going to be on the use of State-owned bottom lands, and on bottom lands that are privately claimed. Other states, it was noted, have addressed a similar issue. Where, for example, there have been private use of public bottom lands the states have tended to "grandfather" in existing uses on a particular date; and have enacted a fee mechanism for the future of public bottom lands. One example noted was marinas. The question was whether operators of marinas should be charged a fee for using public bottom lands. Questions were also raised about the possibility of charging fees for other uses.

Committee member Ms Karen Gottovi expressed the view that the question of "boataminiums" should be addressed. She noted that some marinas which are "private" sell dock spaces for substantial sums.

FINDINGS

After considering all of the information presented, and examining the law on submerged lands under navigable waters, the Committee makes the following findings:

- i. As a result of the enactment of G.S.113-205, and the large numbers of claims registered with the Secretary of the Department of Natural Resources and Community Development since the enactment, the State of North Carolina faces the immediate loss of public-ly-owned submerged lands under navigable waters in 25 coastal counties to private ownership. These lands are embraced with a public trust right. There is the possibility that title may be lost by claims of adverse possession by private individuals under G.S. 1-35(2), and thus barring further legal action by the State. Additionally, the State faces the possibility of losing the public resources that have been invested in natural shellfish beds, and public programs to stimulate shellfish production.
- ii. The State's claim to ownership of submerged lands are based upon various theories. The court decisions on the subject tend to vary from case to case. The ownership claims that have been registered, therefore, do not lend themselves to certain analysis in every case. Nevertheless, the doctrine of public trust is firmly established by case law. Under this

doctrine the State holds title to the submerged lands under navigable waters. That title is held in public trust for the use and benefit of the people of the State. Moreover, when private ownership to submerged lands has been recognized, the decisions consistently hold that such lands are subject to continuing public easement for navigation, fishing, public recreational uses, and for commerce.

- iii. The claims registered under G.S. 113-205 involve a substantial portion of 25 coastal counties, and are varied. They include: shellfish, marshlands (a substantial number of which are from deeds originally issued by the State Board of Education), fee simple (including riparian rights, and deed to open waters), claims which are not to submerged lands and which cannot be determined from the information filed with NRCD, and miscellaneous claims involving state grants, low water mark in the Atlantic Ocean, option leases, and various types of easements. There are some private, claims, e.g. claims to the tidal marshlands, that could be recognized without any serious impact on the public use of the submerged lands and waters. However, the State's title to submerged lands under navigable waters could be seriously undermined if, among other things, mineral resources

are discovered on such lands, or the public is absolutely excluded from using such navigable waters.

- iv. Additional laws are in fact needed to address and resolve the claims. The State has been put on notice of private claims to public lands, and such claims may prevail under the existing adverse possession law. Specifically, legislation is needed to modify the law pertaining to adverse possession , and the procedures for resolving the claims.
- v. The existing statutory provisions governing the State's management of submerged lands are effective. However, there is a need for more vigorous enforcement of the public trust rights to such lands.
- vi. Time did not permit the Committee to determine with certainty whether additional laws are needed to revise the management system for submerged lands held by the State.

RECOMMENDATIONS

The issues raised by this study are as numerous as they are complex. The Committee was unable to address all of the concerns due to time and budget constraints. Some of the problems require immediate attention by the General Assembly, and others are ongoing requiring further consideration and will ultimately require appropriate legislative response. It is imperative that the General Assembly continue to devote some attention to the submerged lands in the coastal areas as well as on the inland waterways. Significant public trust rights will be lost if these lands and navigable waters above them are allowed to pass into the hands of private individuals. The state faces an immediate problem when, according to the information received, as much as 70 per cent of all estuarine lands between Carteret County and the South Carolina boundary are privately claimed. It is quite clear that the State's interest here on behalf of all of its citizens as the guardian of the public trust is significant. The Committee therefore urges the General Assembly to enact, as quickly as possible, legislation to assist the appropriate state agencies in resolving the claims filed under G.S. 113-205. The Committee specifically recommends that the General Assembly enact legislation to:

- A. Prevent ownership of public trust property by adverse possession.

The Committee endorses the view that the adverse possession law is not intended to permit private

ownership of the property which the State can not otherwise sell. The proposed legislation would not apply to pending litigation. The recommended legislation is at Appendix G-1.

- B. (1) Modify the procedures by which claims to submerged lands may be prosecuted.

The law presently requires an individual claimant to apply to the Industrial Commission if by the application of G.S. 113-205 and G.S. 113-206 there is "deemed" to be a taking of private property. The Committee believes that a better approach is to allow the claimant to sue the state in the Superior Court in the county in which the taking is alleged to have occurred. The recommended legislation to accomplish this objective is at Appendix G-4.

- (2) Require that the State respond to the claims by a time certain, and require an annual status report on their disposition. See Appendix G-4.

- C. Confirm title to raised lands in an owner whose Board of Education deed included regularly flooded estuarine marsh lands, and lands beneath navigable waters. The recommended legislation is at Appendix G-7.

- D. (1) Confirm and validate title as conveyed by the Board of Education including the flooded portions of the marsh lands within the bounds of the deeds, but make the flooded marsh land areas subject to all

public trust rights which apply to them at the time of the conveyance; and

(2) Require that the state tax credit for donating G.S. 113-205 claims to the State expire in 1990.

The recommended legislation to accomplish these two objectives is at Appendix G-9.

E. Resolve claims to shellfish beds by allowing the Secretary of NRCD to issue shellfish leases for claimed areas which include natural Shellfish beds.

The recommended legislation is at Appendix G-H.

F Before the General Assembly enacts any legislation affecting submerged lands under navigable waters in the coastal areas of the State, consideration should be given to conducting one or more public hearings in some central locations in the coastal counties.

The Committee further recommends that the General Assembly give some consideration to enacting legislation to designate a guardian of the public trust rights. This issue has been raised by both the Attorney General's office and the Secretary of Administration. Due to the time constraints, the Committee did not address this issue. In response to the Committee's request, the Attorney General's Office prepared a draft of proposed legislation to protect the public trust rights. The Committee recommends that this proposed legislation be studied by the General Assembly for possible enactment. It is included as Appendix H.

The Committee recommends that the General Assembly study the possibility of authorizing the charging of fees for leases or easements for the public trust areas that are used for private purposes.

Finally, the Secretary of Administration has recommended that the General Assembly consider a constitutional amendment to repeal that provision requiring funds from the sale of vacant unappropriated lands and swamp lands be dedicated to the public schools. The Committee takes no position on this proposal, but recommends that the General Assembly consider a study of this matter.

APPENDIX A

LEGISLATIVE RESEARCH COMMISSION

Senator W. Craig Lawing, Cochairman
Senator William N. Martin
Senator Helen R. Marvin
Senator William W. Staton
Senator Joseph E. Thomas
Senator Russell Walker

Representative Liston B. Ramsey, Cochairman
Representative Christopher S. Barker, Jr.
Representative John T. Church
Representative Bruce Ethridge
Representative John J. Hunt
Representative Margaret Tennille

GENERAL ASSEMBLY OF NORTH CAROLINA

1983 SESSION (REGULAR SESSION, 1984)

RATIFIED BILL

CHAPTER 1112
HOUSE BILL 738

AN ACT AUTHORIZING STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, AUTHORIZING ADDITIONAL STUDIES, AND MAKING VARIOUS APPROPRIATIONS FOR STUDIES.

The General Assembly of North Carolina enacts:

. . . .

Sec. 3. Coastal Submerged Lands. The Legislative Research Commission is authorized to study (i) the existing statutes concerning the ownership of the submerged lands and coastal waters within the counties designated in G.S. 113-205; (ii) the existing decisions by the Supreme Court of North Carolina concerning the ownership of said lands and waters; (iii) the nature of the claims and the impact that recognition of the claims would have on existing public uses of the submerged lands and coastal waters; (iv) the need for additional laws to address the claims and facilitate resolution of the claims; (v) the existing statutes concerning management of the submerged lands by the State; (vi) the need for additional laws to revise the management system in place for submerged lands held by the State; and (vii) such other matters relating to the private claims and management of State held submerged lands as it deems important.

Sec. 4. For each of the topics the Legislative Research Commission decides to study, the Commission may report its findings, together with any recommended legislation, to the 1985 General Assembly.

. . . .

Sec. 13. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 7th day of July, 1984.

JAMES C. GREEN

James C. Green

President of the Senate

LISTON B. RAMSEY

Liston B. Ramsey

Speaker of the House of Representatives

COASTAL AREA SUBMERGED LANDS
STUDY COMMITTEE

Sen. R.C. Soles, Jr.,
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COURT OF APPEALS

State v. Forehand

STATE OF NORTH CAROLINA v. MYRTLE ADAMS FOREHAND AND HUSBAND WILLIAM T. FOREHAND; LOUISE BADHAM; EMMA BADHAM GARDNER; HELEN HOUSE; HENRY C. HOUSE, III AND WIFE, MARY O. HOUSE; J. MEREDITH JONES AND WIFE, ELVIRA JONES; BURTON H. JONES AND WIFE, JEAN JONES; KNOWN AND UNKNOWN, BORN AND UNBORN HEIRS OF W. H. JONES, DECEASED; UNKNOWN PARTIES, DEFENDANTS v. JOHN POOL AND WIFE, ELIZABETH POOL, INTERVENORS v. MIRIAM F. McFADDEN, ET AL., INTERVENORS v. SOUTHHOLD REALTY CORP., INTERVENORS

• • • •

APPEAL by defendant from *Battle, Judge*. Judgment entered 22 June 1982 in Superior Court, DARE County. Heard in the Court of Appeals 15 November 1983.

• • • •

BECTION, Judge.

I

Defendant, Southhold Realty Corporation (Southhold) appeals the trial court's denial of Southhold's land claim in a condemnation proceeding. We affirm.

Southhold, on 21 October 1981, filed a motion to intervene in an action by the North Carolina Department of Administration (DOA) to condemn a 3.799 acre tract adjacent to Jockey's Ridge State Park. The condemned land borders Roanoke Sound on the west and Jockey's Ridge State Park on the east. The DOA had initiated condemnation proceedings on 5 December 1979 by filing a complaint and declaration of taking and by depositing with the court the estimated compensation. The only defendants named in the complaint, Forehand and the Jones heirs (the first group of defendants listed in the case on appeal), claimed title to the land by adverse possession. Southhold claimed title to a portion of the land based on a 1909 State grant No. 17495, to W. T. Greenleaf, for wharf purposes. The trial court allowed Southhold to intervene. Defendants Pool and McFadden subsequently intervened based on a 1903 State grant No. 16035 to W. T. Greenleaf. From a judgment in favor of Forehand, the Jones heirs, Pool and McFadden, Southhold appeals.

II

Southhold brings forward six assignments of error. Because we find Southhold's deed void on its face to convey a fee title in land, Southhold has no standing to contest the trial court's decision. *State ex rel. N.C. Utilities Comm'n v. City of Kinston*, 221 N.C. 359, 20 S.E. 2d 322 (1942).

[1] Southhold presents the Court with an ingenious argument. The 1909 State grant No. 17495 to W. T. Greenleaf conveyed 33 acres of submerged lands "covered by water of Roanoke and Albemarle Sounds for (wharf purposes) and with straight lines with [Greenleaf's] grant No. 16035 dated 5 December 1903." State grant No. 16035 had conveyed 153½ acres of land on the shore of Roanoke Sound, contiguous with the submerged lands grant. Southhold now attempts to assert fee title to a 300-600 foot wide strip of the condemned land bordering on Roanoke Sound, which falls within the metes and bounds description of the submerged lands grant. Through natural processes the land is now above the high watermark. To recognize Southhold's claim, we would first have to conclude that the original grant for wharf purposes conveyed fee title to the submerged lands. We do not.

Almost since statehood, North Carolina policy has leaned towards a prohibition on the sale in fee simple of state lands under navigable waters. Earnhardt, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis*, 49 N.C. L. Rev. 888 (1971). North Carolina has long accepted the public trust doctrine as set forth in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 36 L.Ed. 1018, 13 S.Ct. 110 (1892). See *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903). Under the doctrine, the State holds title to the submerged lands under navigable waters, "but it is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved." Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. Rev. 1, 17 (1972); *Shepard's Point Land Co.*

In *Shepard's Point Land Co.*, our Supreme Court construed an unconditional 1856 grant of submerged lands covered by navigable waters in light of the public trust doctrine, common-law riparian rights, and statutory law. A riparian owner owns the land adjacent to a natural watercourse. The Court held that such a grant conveyed an exclusive *easement* to a riparian owner to erect wharves on the submerged lands, but did not convey fee title to the submerged lands. The easement passed as appurtenant to the riparian land. Navigable waters included "any waters, whether sounds, bays, rivers or creeks, which are wide enough and deep enough for navigation of sea vessels." *Shepard's Point Land Co.*, 132 N.C. at 531, 44 S.E. at 43 (quoting *State v. Glenn*, 52 N.C. 321, 325 (1859)).

The same law is applicable to Greenleaf's 1909 State grant No. 17495, for wharf purposes. In fact, the statute construed in *Shepard's Point Land Co.*, N.C. Code § 2751 (1854-55), as amended by 1893 N.C. Sess. Laws, ch. 17, and the holding in *Shepard's Point Land Co.* are now codified at N.C. Gen. Stat. §§ 146-3 and 146-12 (1983). We, therefore, hold that State grant No. 17495 merely conveyed an appurtenant easement to erect wharves to the riparian owner. Southhold's deed was void on its face to convey a fee title interest in the strip of land built up by natural processes above the high tide line.

III

Had the Greenleaf grant conveyed a fee title, Southhold's claim would still be barred on statutory grounds.

[2] N.C. Gen. Stat. § 146-24(c) (1983) empowers the DOA to employ the procedures in Article 9 of Chapter 136 of the General Statutes to acquire land by condemnation. Pursuant to N.C. Gen. Stat. § 136-104 (1981), title to the condemned land and the right to immediate possession vests in the DOA as soon as the DOA has filed the complaint and declaration of taking and deposited with the court the estimated compensation. The right to just compensation vests in the person who owned the land or any compensable interest therein immediately before the filing of the complaint, the declaration of taking and deposit of the money in court. G.S. § 136-104; *N.C. State Highway Comm'n v. York Indus. Center, Inc.*, 263 N.C. 230, 139 S.E. 2d 253 (1964). That person has nothing he can sell pending ascertainment of just compensation. *York Indus. Center, Inc.*

The DOA filed the requisite papers and deposited the money in court on 5 December 1979. Title to the condemned land vested in the DOA immediately. Southhold first acquired an arguable interest in 16 September 1981 when it received a quitclaim deed. But, at that point, Southhold's grantor had nothing to convey. Consequently, Southhold had no right to compensation and no right to intervene in the present action.

We affirm the trial court's denial of Southhold's land claim.

IV

[3] The State cross-assigns error to the breadth of the trial court's fact finding. We disagree and remand for additional findings of fact and conclusions of law.

Forehand and the Jones heirs presented evidence at trial as to their adverse possession of three contiguous tracts: tracts one and two and the home lot, as shown on the plat entitled "Land Claimed by Mrs. Myrtle A. Forehand . . .," prepared by D. R. Smith, R.L.S., 4 August 1978. Tract one represents the condemned land. The DOA failed to object to the evidence. The trial court found as fact that Forehand and the Jones heirs had adversely possessed all three tracts for over eighty years. The State argues that the pretrial order limited the trial court's fact finding to the "question of ownership of the tract condemned in this cause."

A pre-trial order "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

G. Gen. Stat. § 1A-1, Rule 16 (1983). N.C. Gen. Stat. § 136-108 (1981) provides that the trial court, in a condemnation proceeding "shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of . . . title to the land . . . and area taken." One issue raised by the pleadings is the area affected by the taking. The DOA is required to describe in its declaration of taking the area *affected* as well as the area taken. N.C. Gen. Stat. § 136-103 (1981). N.C. Gen. Stat. § 136-112 (1981) clarifies the legislative intent behind G.S. § 136-103. G.S. § 136-112 provides, in pertinent part, that:

The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:

- (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

To recover under G.S. § 136-112(1) the area affected and the area taken must constitute a single tract. Unity of ownership is an important criterion. *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E. 2d 390 (1978); see also *City of Winston-Salem v. Davis*, 59 N.C. App. 172, 296 S.E. 2d 21, *disc. review denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982).

A determination of ownership of the area affected is a prerequisite to a determination of just compensation for the area taken. Limiting the trial court's factfinding to ownership of the area taken alone would deprive the defendants of just compensation. The State's right to exercise the power of eminent domain is "limited by the constitutional requirements of due process and the payment of just compensation for property condemned." *State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 334, 167 S.E. 2d 385, 388 (1969).

A valid exercise of the power of eminent domain presupposes a complete determination of the area affected, including ownership. Since the pre-trial order was erroneously prejudicial on statutory and constitutional grounds, the trial court correctly found facts as to the ownership of the affected tracts of land. These findings are necessary to determine just compensation.

We remand the case to the trial court for findings of fact and conclusions of law regarding whether the three tracts constituted a single tract for the purpose of assessing condemnation damages. The major factors for the trial court to consider are "unity of ownership, physical unity and unity of use." *Board of Transportation v. Martin*, 296 N.C. at 25, 249 S.E. 2d at 394 (quoting *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E. 2d 219, 224-25 (1959)).

V

We affirm as to defendant Southhold and remand for additional findings of fact and conclusions of law on the single tract requirement.

Affirmed in part and remanded.

Judges HEDRICK and WHICHARD concur.

GENERAL SURVEY OF G.S. 113-205 CLAIMSI. Shellfish Claims

Oyster Leases

Onslow

1

TOTAL1.5%Perpetual Franchises, Licenses, etc.

Carteret

1

Chowan

1

Hyde (includes 14 not plotted)

24

TOTAL268%Deeded Bottoms

Carteret

1

Hyde (includes 15 not plotted)

27

Onslow

17

TOTAL4514%TOTAL SHELLFISH CLAIMS7222.5%II. Marshland

Board of Education

Brunswick

1

New Hanover

7

Camden

1

Craven

1

Hyde

0

Onslow

4

TOTAL144%

To Low Water Mark and Other Marsh

Brunswick	13	
Carteret	2	
Craven	1	
Dare	2	
Hyde	15	
New Hanover	7	
Onslow	2	
Pender	1	
<u>TOTAL</u>	<u>43</u>	<u>13%</u>
<u>TOTAL MARSHLAND CLAIMS</u>	<u>57</u>	<u>17%</u>

III. Fee Simple Claims
 (Includes Riparian Rights,
 Deeds to Open Water)

Beaufort	1	
Brunswick	3	
Camden	2	
Carteret	8	
Craven	10	
Currituck	3	
Dare	2	
Hyde	22	
New Hanover	12	
Onslow	12	
Pamlico	1	
Pasquotank	9	
Tyrrell	1	
<u>TOTAL FEE SIMPLE</u>	<u>86</u>	<u>26%</u>

IV. Not Submerged/Not Plotted

Bladen	1
Brunswick	5
Carteret	5
Chatham	1
Chowan	1
Craven	3
Cumberland	1
Currituck	2
Dare	7
Hyde (except shellfish)	37
Johnston	2
New Hanover	8
Onslow	23
Pamlico	1
Pender	8
Robeson	1

TOTAL NOT SUBMERGED106

32%

VI. Miscellaneous

State Grants

Beaufort	1
Hyde	1
Low Water Mark (Atlantic Ocean)	
Brunswick	1
Option to Lease (Phosphate Mining)	
Beaufort	1
Hyde	1
Easement	
Brunswick	1
Craven	2

TOTAL MISCELLANEOUS CLAIMS82.5%

SUBMERGED LANDS POLICY

WHEREAS more than 10,000 claims were filed, pursuant to General Statute 113-205, to submerged lands in the coastal counties of this State which require resolution, the Secretaries of the Departments of Administration and Natural Resources and Community Development do hereby declare that the following policies shall be applied to resolve the claims:

1. To the ordinary high water mark, lands beneath the open waters of the Atlantic Ocean, the inlets, the sounds, rivers and creeks subject to lunar tides or salt water influx have been and are the property of all the people of this State held in public trust. See Collins v. Benbury (II), 27 N.C. 118 (1844).
2. To the ordinary high water mark, lands beneath the open waters of nontidal sounds, rivers and creeks which were historically deep and wide enough for navigation by sea vessels have been and are the property of all the people of this State held in public trust.

The term "sea vessels" is employed as it was commonly used in 1828 when it was first applied by the Supreme Court of North Carolina in Wilson v. Forbes, 13 N. C. 30 (1828). The stream found to be navigable by the Court was 60 yards wide at its mouth with a depth of 6 to 8 feet.

3. Private interests which are recognized in the waters described in 1. and 2. above shall be limited to valid:
 - a. Shellfish leases;
 - b. Shellfish franchises;
 - c. Easements for riparian access;
 - d. Duck blind leases;
 - e. Mineral leases;

- f. Utility easements granted by Council of State or issued by any State agency authorized to issue such interests by the Constitution and laws of the State.

Recognition that the claim is supported by such an instrument shall not relieve the claimant of the separate burden of demonstrating that the holders of the claim have complied with the terms and conditions under which the interest issued and is held. The State reserves the right to institute an action pursuant to G. S. 146-63, or other appropriate statutes, to vacate any such interest for failure to comply with the terms and conditions on which the interest was issued.

- 4. Lands beneath the open waters of nontidal rivers, streams, and creeks which historically were not deep and wide enough for navigation by sea vessels may be the subject of private ownership unless the Legislature declared the river or creek to be navigable water. The nontidal rivers, streams and creeks which historically were used for the purposes of transportation or commercial intercourse are subject to a public easement for commercial and recreational navigation even if the bed is privately owned.
- 5. The nontidal marshlands and swamplands in the counties listed in G. S. 113-205 may be the subject of private ownership.
- 6. The marshlands flooded on a daily basis by tidal action may be the subject of private ownership by and through deeds issued by the Literary Fund, the Literary Board of North Carolina, or the State Board of Education of North Carolina. Such privately owned tidal marshlands are subject to the public trust rights which apply to other tidal water and to reparation or littoral rights of upland property owners.
- 7. Lands beneath open waters which were created by dredging privately-owned, non-tidal lands are the property of the successor in interest of the owner that caused the dredging to be done, unless the lands have been deeded to the public or become State property through other legal process.

8. Privately owned bottoms and the superjacent waters, as described in #6 above, may be subject to the public trust rights.
9. Filled lands which were created from the beds of publicly owned water bodies may be the subject of private ownership when:
 - a. The Council of State or any other authorized State agency issued a deed for the filled lands; or
 - b. The lands have been filled for more than thirty years or twenty-one years with color of title and the requisite of adverse possession as proved.
 - c. The filled lands were placed on privately owned tidal marshlands as described in #6 above.

The State policies set out above are to be applied in resolving the claims of interest in submerged lands in a manner which is not in conflict with the State's policy to conserve and protect its lands and waters for the benefit of all its citizenry as set forth in Article XIV, Section 5 of the Constitution of North Carolina or which limits the authority of the State and local governments to regulate the uses of the lands claimed pursuant to Article VII, Section 1 of the Constitution of North Carolina.

THEREFORE, these policies as set forth herein shall be applied by the Department of Administration and the Department of Natural Resources and Community Development to resolve claims to submerged lands filed pursuant to General Statute Section 113-205.

NORTH CAROLINA DEPARTMENT
ADMINISTRATION

4/17, 1984

By Jane Smith Patterson
Jane Smith Patterson
Secretary

NORTH CAROLINA DEPARTMENT OF
NATURAL RESOURCES AND
COMMUNITY DEVELOPMENT

4/5, 1984

By James A. Summers
James A. Summers
Secretary

SESSION 19 84

INTRODUCED BY:

**DRAFT
FOR REVIEW ONLY**

Referred to:

1

A BILL TO BE ENTITLED

2

AN ACT TO PREVENT ADVERSE POSSESSION OF REAL PROPERTY WHERE
TITLE IS HELD BY THE STATE IN TRUST FOR THE BENEFIT OF ALL
CITIZENS.

5

The General Assembly of North Carolina enacts:

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Section 1. G.S. 1-35 is amended by adding the
following sentence as a new unnumbered paragraph following
the end of subsection (2):

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"Nothing herein shall prevent the State from suing any
person for, or in respect of, any real property encumbered
by public trust rights , or the issue or profits thereof, by
reason of the right or title to the same where title to such
property is deemed to be held by the State in public trust
for the use and benefit of the people of this State. As used
in this subsection "public trust rights" means those rights
held in trust by the State for the use and benefit of the
people of the State in common. They are established by
common law as it is applied by the courts of the State.
They include, but are not limited to, the right to
navigate, swim, hunt, fish, and enjoy all recreational
activities in the watercourses of the State and the right to
freely use and enjoy the State's ocean and estuarine beaches
and public access to the beaches."

SESSION 19 83**DRAFT**
FOR REVIEW ONLY

1 Sec. 2. This act shall not affect any pending
2 litigation.

3 Sec. 3. This act is effective upon ratification.

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SESSION 19 85

INTRODUCED BY:

**DRAFT
FOR REVIEW ONLY**

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE PROCEDURES BY WHICH CLAIMS TO LAND UNDER
3 NAVIGABLE WATERS MAY BE PROSECUTED.
4 The General Assembly of North Carolina enacts:
5 Section 1. G.S. 113-206(e) is rewritten to read:
6 "(e) To the extent that any application of the pro-
7 visions of G.S. 113-205 and this section is deemed to
8 constitute a taking of private property, any claimant may
9 institute an action in the superior court of the county in
10 which the land is located to contest the application of G.S.
11 113-205 and this section. In such proceeding the burden of
12 showing title or right of fishery, by a preponderance of the
13 evidence, shall be upon the claiming title or right holder.
14 In the event the claiming title or right holder prevails the
15 court shall fix the monetary worth of the claim. The
16 Department may elect to condemn the claim upon payment of
17 the established owners or right holders their pro rata
18 shares of the amount so fixed. The Department may make such
19 payments from funds that may be available to it. An appeal
20 lies to the appellate division by either party as to the
21 validity of the claim. The Department of Natural Resources
22 and Community Development may be represented by the Attorney
23 :

DRAFT
FOR REVIEW ONLY

1 General in actions under this section. The limitation
2 period upon any claim brought under the authority of this
3 subsection is three years. Where the claiming party asserts
4 damage from voiding of a grant or right under G.S.
5 113-205(a) and further asserts his minority or other
6 disability subsequent to January 1, 1970, the claimant is
7 granted a period of three years after attaining majority or
8 after removal of the disability in which to prosecute his
9 claim. No claims pursuant to this section may be
10 entertained by the superior court under the authority of
11 this subsection after December 31, 1993."

12 Sec. 2. G.S. 113-206 is amended by adding a new
13 paragraph (f) to read:

14 "(f) In the Secretary's evaluation of the claims,
15 there shall be a presumption in favor of public ownership of
16 submerged lands and in favor of public trust rights. This
17 statement of policy shall not alter or affect in any way the
18 rights of a claimant or the State.

19 In cooperation with the Secretary of Administration and
20 the Attorney General, the Secretary shall establish a plan
21 to respond to all claims by December 31, 1990. The
22 Secretary shall transmit copies of the responses to claims
23 to the Secretary of Administration and Attorney General. On
24 or before October 1, of each year, the Secretary of Natural
25 Resources and Community Development shall submit a report to
26 the Joint Legislative Commission on Governmental Operations
27 which includes a statement of the number of claims resolved
28 and unresolved, the costs of resolving such claims, and the

DRAFT
FOR REVIEW ONLYSESSION 19 83

1 costs of acquiring recognized claims which the Secretary
2 considers appropriate and necessary for the conservation of
3 marine and estuarine resources of North Carolina or for
4 public trust purposes."

5 Sec. 2. This act is effective upon ratification.
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SESSION 19 85

INTRODUCED BY: *

**DRAFT
FOR REVIEW ONLY**

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO CONFIRM THE TITLE TO CERTAIN LANDS RAISED FROM
3 NAVIGABLE WATERS.

4 The General Assembly of North Carolina enacts:

5 Section 1. G.S. 146-6(b) is amended by addition of a
6 second sentence to read:

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8 "However, when land so raised was within the bounds
9 of a deed which included regularly flooded estuarine
10 marshlands and lands beneath navigable waters, and
11 which deed was issued by the State Board of Educa-
12 tion, title thereto shall be vested in the owner or
13 owners of the said deed."

14 Sec. 2. G.S. 146-6 is amended by adding a new
15 section (e) to read:

16 "(e) Notwithstanding any other provision of law, the
17 title to any land in or along the Atlantic Ocean
18 raised, by act of man, above the high watermark shall
19 vest in the State. All such lands shall thereafter
20 be open to the free use and enjoyment of the people
21 of the State consistent with the public trust rights
22 in ocean beaches which are part of the common heri-
23 tage of the State of North Carolina."

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DRAFT
FOR REVIEW ONLY

SESSION 19 85

1 Sec. 3. This act shall become effective upon ratifi-
2 cation.

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SESSION 19 85

(Public)

INTRODUCED BY:

DRAFT
FOR REVIEW ONLY

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CONFIRM THE TITLE TO CERTAIN MARSHLANDS SHOULD BY
THE STATE BOARD OF EDUCATION.

The General Assembly of North Carolina enacts:

Section 1. Article 4 of Chapter 146 is amended by
adding a new section to read:

"§ 146-20.1. Title to certain marshlands.

Notwithstanding any other provisions of law, the title
to all marshlands, including regularly flooded estuarine
marshlands, and all swamplands which have heretofore been
conveyed by the Literary Fund, the Literary Board of North
Carolina, or the State Board of Education of North Carolina
are hereby validated, ratified and confirmed, and the
persons, firms or corporations to whom such marshlands or
swamplands have been conveyed or granted or their successors
in title are hereby declared to have such title thereto;
provided however, the areas of regularly flooded estuarine
marshlands within such conveyances remain subject to all
public trust rights which applied to said marshlands prior
to the conveyance. If the owner of such marshlands offers
to donate the property to the State of North Carolina and
the property was the subject of a claim filed pursuant to
G.S. 113-205, the offer of donation must be made prior to

DRAFT
FOR REVIEW ONLY

SESSION 19 85

1 December 31, 1990 to qualify for any tax credit provision
2 codified at G.S. 105-131.12."

3 Sec. 2. This act shall be effective upon
4 ratification.
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INTRODUCED BY:

**DRAFT
FOR REVIEW ONLY**

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO RESOLVE CLAIMS TO SHELLFISH BEDS BY ISSUANCE OF
3 LEASES.
4 The General Assembly of North Carolina enacts:
5 Section 1. G.S. 113-206 is amended by adding a
6 new paragraph (b1) to read:
7 "(b1) In the event a claim is based on an oyster
8 grant, a shellfish grant, or a perpetual franchise for
9 shellfish cultivation, the Secretary may recommend resolu-
10 tion of the claim by issuance of a shellfish lease for the
11 area claimed, or any part thereof, pursuant to G.S. 113-202.
12 It is presumed that such areas will include a natural
13 shellfish bed, as defined at G.S. 113-201.1(1), due to the
14 cultivation efforts of the claiming title or right holders.
15 Notwithstanding the prohibition against issuance of
16 shellfish leases in areas that contain natural shellfish
17 beds at G.S. 113-202(a) (2), the Marine Fisheries Commission
18 is authorized to issue shellfish leases to resolve such
19 claims. No shellfish lease issued pursuant to this sub-
20 section shall exceed 50 acres."

21 Sec. 2. This act shall be effective upon rati-
22 fication.
23
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SESSION 1985

INTRODUCED BY:

Short Title:

(Public)

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE FOR MANAGEMENT AND PROTECTION OF THE
3 PUBLIC TRUST RESOURCES HELD BY THE STATE IN TRUST FOR THE
4 BENEFIT OF ALL ITS PEOPLE.

5 The General Assembly of North Carolina enacts:

6 Section 1. G.S. Chapter 113A is amended by adding
7 Article 15 to read:

8 ARTICLE 15 - PUBLIC TRUST RESOURCES PROTECTION

9 §113A-215. Short title

10 This Article shall be known as the Public Trust Re-
11 sources Protection Act of 1985.

12 §113A-216. Definitions.

13 The following definitions shall apply throughout this
14 Article unless otherwise specified:

15 1. Board means Public Trust Resources Board.

16 2. Imminent Hazard means a situation which is causing
17 or is likely to cause an immediate threat to life or
18 property or a serious risk of irreparable damage to public
19 trust properties or rights if no immediate action is taken.

20 3. Person means an individual, corporation, company,
21 association, partnership, unit of local or state government
22 or other legal entity.

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1 4. Public Trust Nuisance means any unauthorized or
2 illegal encroachment upon, usurpation of, or action in
3 violation of, the public trust rights of the people of this
4 State.

5 5. Public Trust Rights means those inalienable rights
6 held in trust for the use and benefit of the people of the
7 State in common as determined by the courts of this State
8 and/or the Board which include, but are not limited to, the
9 right to navigate, swim, hunt, fish and enjoy all recre-
10 ational activities in the watercourses of the State; the
11 right to freely use and enjoy the State's ocean and estua-
12 rine beaches and public access to the beaches; the right to
13 use and enjoy lands held through conservation easements
14 which have been opened to the public; and the right to use
15 and enjoy lands held in trust by State and local governments
16 for the use and benefit of the people of the State which
17 have been opened to the public.

18 6. Standard means any duly adopted rule or regulation
19 by a State agency or unit of local government, local
20 ordinance, land use plan criterion or any other legally
21 binding requirement.

22 7. Watercourse means the Atlantic Ocean, any inlet,
23 sound, river, creek, stream,^o or other free flowing body of
24 water which can be navigated by any vessel, or lake or pond
25 which is publicly owned.

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1 §113A-217. Legislative Findings.

2 It is determined and declared as a matter of legisla-
3 tive findings that the common heritage of all the people of
4 this State includes the shared rights known as public trust
5 rights. These rights were founded in the Common Law and
6 have evolved and continue to evolve as the needs of society
7 dictate.

8 At Common Law, management of public trust rights is a
9 duty of the General Assembly. Encroachment upon and usurpa-
10 tion of public trust rights has been a by-product of the
11 accelerated development occurring throughout the State. It
12 is necessary that the responsibility of management be
13 delegated to prevent further inappropriate encroachment upon
14 and usurpation of public trust rights. Protection against
15 such acts and enforcement of the public trust rights against
16 usurpers should remain with the Common Law guardian and
17 protector of public trust rights, the Attorney General.

18 §113A-218. Public Trust Resources Board.

19 (a) Established. - The General Assembly hereby estab-
20 lishes within the Department of Justice a board to be
21 designated the Public Trust Resources Board.

22 (b) Composition. - The Public Trust Resources Board
23 shall consist of five (5) members, as follows:

24 (1) The Attorney General, or a designated deputy
25 attorney general;

26 (2) The Secretary of the Department of Adminis-
27 tration, or a designated deputy or assistant
28 secretary;

(3) The Secretary of the Department of Natural Resources and Community Development, or a designated deputy or assistant secretary; and

(4) Two citizens, one of whom shall be appointed by the Lieutenant Governor and the other, by the Speaker of the House of Representatives.

(c) Terms. - The two citizen members shall serve staggered terms of office of four years. The initial appointments shall be made prior to September 1, 1985, and the appointee by the Speaker of the House of Representatives shall serve an initial term of two years. The appointees shall hold office until July 1 of the year in which their respective terms expires and until their successor is appointed. Vacancies in the citizen appointees to the Board occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy.

(d) Office May Be Held Concurrently With Others. - Membership on the Public Trust Resources Board is hereby declared to be an office that may be held concurrently with other elective or appointive offices in addition to the maximum number of offices permitted to be held by one person under G.S. 128-1.1.

(e) Officers. - The Attorney General shall be chairman of the Board. If the Attorney General serves by designee, the chairman as well as the vice chairman shall be elected by and from the members of the Board and shall serve for a term of two years or until expiration of the member's regularly appointed term.

1 (f) Compensation. - Members of the Board who are State
2 officers or employees shall receive no compensation for
3 serving on the Board, but may be reimbursed for their
4 expenses in accordance with G.S. 138-6. Members of the
5 Board who are full-time salaried public officers or em-
6 ployees shall receive no compensation for serving on the
7 Board, but may be reimbursed for their expenses in accor-
8 dance with G.S. 138-5(b). All other members of the Board
9 may receive compensation and reimbursement for expenses in
10 accordance with G.S. 138-5.

11 (g) Meetings. - The Board shall meet at least once in
12 each quarter upon the call of the chairman. Special meet-
13 ings shall be held upon the call of the chairman or the vice
14 chairman, or upon the written request of at least three
15 members of the Board. Such special meetings must be held
16 within 30 days.

17 (h) Staff. - The Attorney General shall designate a
18 special deputy attorney general as executive secretary to
19 the Board and provide such additional clerical assistance as
20 the Board requires.

21 §113A-219. Duties of Board.

22 The Board shall have the following functions and
23 duties:

24 (1) To conduct an ongoing assessment of public trust
25 rights in this State which assessment shall include an
26 identification and definition of those rights as applied to
27 public and private property;

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1 (2) To review any request or recommendation for the
2 sale, lease or rental of state owned land to determine
3 existing public trust rights and existing or available
4 routes for egress and ingress to watercourses, and other
5 areas where public trust rights exist;

6 (3) To recommend reservation and dedication of routes
7 for egress and ingress to watercourses, and other areas
8 where public trust rights exist on, or adjacent to, state
9 owned lands;

10 (4) To establish and recommend, state guidelines for
11 public trust lands, waters, and rights to consist of
12 statements of objectives, policies and standards to be
13 followed in public and private use of land and water areas
14 which protect public trust rights;

15 (5) To develop, promulgate, publicize, and advocate a
16 comprehensive State public trust resources protection
17 program;

18 (6) To assist the Board in developing the public trust
19 resources protection program required by this Article, the
20 Board is authorized to appoint an advisory committee con-
21 sisting of technical experts;

22 (7) To recommend to the Governor and to the General
23 Assembly needed legislation for management, enhancement and
24 protection of public trust rights and to recommend for
25 implementation such modification of State policy, plans and
26 programs as the Board considers necessary and desirable for
27 enhancement and protection of public trust rights;

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1 (8) To investigate reported encroachments upon,
2 usurpations of, or any other violations, of the public trust
3 rights of the people of the State; and

4 (9) To initiate civil actions, as authorized by this
5 Article, to remove any unlawful or unauthorized encroachment
6 upon, usurpation, of or any other violation, of the public
7 trust rights of the people of this State.

8 §113-220. Effect of State Guidelines.

9 Any State land policies and decisions governing the
10 acquisition of and disposition of land by the Council of
11 State, State departments and agencies shall take account of
12 and be consistent with the State guidelines established
13 under this Article. In land and water areas where other
14 standards afford greater protection and enhancement of
15 public trust rights than the State guidelines established
16 pursuant to the Article, the more strict standards shall be
17 applied.

18 §113-221. Investigation of Violations.

19 (a) The Secretary of the Department of Natural Re-
20 sources and Community Development and the Secretary of the
21 Department of Administration shall establish a procedure by
22 which the officers, agents and employees of the departments
23 may report activities or property which it is reasonably
24 believed unlawfully interfere with the public trust rights
25 of the people of the State. The Secretaries shall direct
26 their respective officers, agents and employees to report
27 suspected violations. The Secretaries may cause these

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1 reported violations to be investigated and report the
2 findings with recommendations for action pursuant to this
3 Article.

4 (b) Copies of all reports of suspected violation
5 prepared in accordance with (a) shall be sent to the execu-
6 tive secretary to the Board for distribution to its members.

7 (c) The Attorney General is hereby authorized to
8 appoint investigators to analyze complaints of suspected
9 violations of the public trust rights and report findings
10 with recommendations for action pursuant to this Article to
11 the Board.

12 §113A-222. Abatement of public trust nuisance.

13 (a) To assure adequate and prompt protection for
14 public trust rights, the Attorney General is hereby
15 authorized to initiate actions to abate public trust
16 nuisances and/or for injunctive relief pursuant to this
17 Article without prior review by the Board. The Board shall
18 review each complaint of suspected violation to determine
19 whether further action is necessary. In addition, upon
20 determination by the Board that legal action to remedy the
21 violation is necessary, the Board may direct the Attorney
22 General to initiate actions to remedy the violation and
23 restore public trust rights.

24 (b) When it is determined that a public trust nuisance
25 exists, the Attorney General may issue an order of abatement
26 directing the owner, lessee, operator or other person in
27 control of the property, that has been determined a public
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1 trust nuisance, to take any action necessary to abate the
2 public trust nuisance. If the person refuses to comply with
3 the order, the Attorney General may institute an action in
4 the superior court of the county where the public trust
5 nuisance exists to enforce the order. The action shall be
6 calendared for trial within sixty (60) days after service of
7 the complaint upon the defendant. The court may order the
8 owner to abate the nuisance or direct the Attorney General
9 to abate the nuisance. If the Attorney General is ordered
10 to abate the nuisance, the Department of Justice shall have
11 a lien upon the real property of the person for the costs of
12 the abatement of the nuisance in the nature of a mechanic's
13 and materialmen's lien as provided in Chapter 44A of the
14 General Statutes and the lien may be enforced as provided
15 therein.

16 (c) If the Attorney General determines that an
17 imminent hazard exists, the Attorney General may, after
18 notice to or reasonable attempt to notify the owner, enter
19 upon any property and take any action necessary to abate the
20 imminent hazard. The Department of Justice shall have a
21 lien upon the real property of the person in control of the
22 property for the cost of the abatement of the imminent
23 hazard in the nature of a mechanic's and materialmen's lien
24 as provided in Chapter 44A and the lien may be enforced as
25 provided therein. The lien may be defeated by a showing
26 that an imminent hazard did not exist at the time the
27 Attorney General took the action.

1 (d) The institution of an action for abatement of
2 public trust nuisance under this section shall not relieve
3 any party to such proceeding from any civil or criminal
4 penalty otherwise prescribed for the violation. Nor shall
5 it impair the ability of State or local agencies to enforce
6 other laws and ordinances which protect public trust rights.

7 §113A-223. Legal Representation.

8 The Attorney General shall act as attorney for the
9 Board and shall initiate actions in the name of, and at the
10 request of the Board, and shall represent the Board in the
11 review of any action of the Board.

12 §113A-224. Injunctive Relief.

13 (a) Whenever there exists reasonable cause to believe
14 that any person has unlawfully encroached upon, usurped, or
15 otherwise violated the public trust rights of the people of
16 the State, a civil action may be instituted by the Attorney
17 General for injunctive relief to restrain the violation.
18 The action shall be brought in the superior court of the
19 county in which the violation occurred and shall be in the
20 name of the State upon the relation of the Attorney General
21 or the Board.

22 (b) Upon determination by a court that an alleged
23 violation occurred, it shall enter such orders or judgment
24 as are necessary to abate the violation. The institution of
25 an action for injunctive relief under (a) of this section
26 shall not relieve any party to such proceeding from any

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1 civil or criminal penalty otherwise prescribed for the
2 violation.

3 §113-225. Protection of Landowner's Rights.

4 Nothing in this Article authorizes any governmental
5 agency to issue any order that constitutes a taking of
6 property in violation of the Constitution of this State or
7 of the United States.

8 Sec. 2. G.S. 113-8 is amended by addition of the
9 following sentence at the end of the first paragraph to
10 read:

11 "It shall make investigations of the public trust
12 resources held by the State for the use and benefit of its
13 citizens, and take such measures as it may be best suited to
14 promote the protection and enhancement of such resources."

15 Sec. 3. G.S. 113-3 is amended by addition of paragraph
16 (6) in sub-section (a) to read:

17 "(6) In the protection and enhancement of the public
18 trust resources held by the State for the use and benefit of
19 its citizens."

20 Sec. 4. G.S. 143B-276(1) is amended by addition of the
21 following words after the word "environment": "and public
22 trust resources."

23 Sec. 5. G.S. 146-3 is amended by addition of sub-
24 section (3) to read:

25 "(3) No lands owned by the State which front upon or
26 are near to any lake, navigable stream or other body of
27 navigable water, convenient access to which is not provided
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1 by public road or roads, or otherwise, shall ever be sold,
2 leased or rented, without reserving to the people of the
3 State an easement across the lands for convenient access to
4 such waters."

5 Sec. 6. G.S. 143-341(4)(e) is amended by addition of
6 the following sentence at the end of the paragraph to read:

7 "No lands owned by the State which front upon or are
8 near to any lake, navigable stream or other body of
9 navigable water, convenient access to which is not provided
10 by public road or roads, or otherwise, shall ever be sold,
11 leased or rented, without reserving to the people of the
12 State an easement across the lands for convenient access to
13 such waters."

14 Sec. 7. This act is effective upon ratification.

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